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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. .....

STATE OF OHIO, EX REL. ROY DUNHAM,
Petitioner,

vs.

BOARD OF EDUCATION OF THE CITY SCHOOL DISTRICT OF THE CITY OF CINCINNATI, OHIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

The petitioner, State of Ohio, ex rel. Roy Dunham, respectfully prays that a writ of certiorari be directed to the Supreme Court of Ohio, to review a judgment of that court of January 24, 1951, and the order denying an application for a rehearing, on February 14, 1951, affirming a judgment of the Court of Appeals of the First Judicial District of Ohio, against this petitioner.

SUMMARY AND STATEMENT OF MATTER INVOLVED.

Petitioner filed suit in January, 1950, in the Court of Appeals for Hamilton county for a writ of mandamus, to compel the respondent, the board of education, to supply his minor son, Edward Dunham, age 8 years, with a free education as provided for by Section 4838-1 of the General Code of the state of Ohio, which is as follows, to wit:

> "Free education to be provided; minimum school year. The board of education of each city, exempted village and local school district shall provide for the free education of the youth of school age within the district under its control, at such places as will be most convenient for the attendance of the largest number thereof. Every day school so provided shall continue not less than thirty-two weeks in each school year. *History—122 v. 534, No. 1. Eff. 9-24-47."

Petitioner alleged, among other things, that said free education had been denied his child, since the seventeenth day of March, 1949, in spite of the fact that the child was of school age and a resident of the school district.

An answer was filed by the respondent stating that it was supplying educations to school children in its district at public schools and that petitioner's son was denied admittance to public schools because he had not been vaccinated in accordance with the regulation of the respondent, reading as follows, to wit:

> "Section 10.3. Vaccination. No person shall be admitted as a pupil in any day school who does not produce satisfactory evidence of immunization against smallpox."

This regulation the respondent claims was passed by the authority of Section 4838-5, General Code of the state of Ohio, which is as follows, to wit:

"Vaccination and immunization of pupils to prevent spread of diseases. The board of education of each city, exempted village or local school district may make and enforce such rules and regulations to secure the vaccination and immunization of, and to prevent the spread of communicable diseases among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety and interest of the public require. Boards of health, councils of municipal corporations, and trustees of townships, on application of the board of education of the district, at the public expense, without delay, shall provide the means of vaccination and immunization to such pupils as are not provided therewith by their parents or guardians. History—120 v 475, (530), No. 1. Eff. 9-16-43. For an analogous section, see former G. C. Sec. 7686. R. S. Sec. 3986; 69 v 22, No. 1."

Petitioner replied to the answer stating that he and his son were members of the Union Assembly of the Church of God; that the Church was opposed to the use of medication or medical science in any manner as being contrary to their religious scruples, which maintained that the healing powers of God Almighty were their only shield against diseases, and that vaccination was against their religious precepts and teachings; that to compel him to have his son vaccinated violated his rights to freedom of religion, worship and conscience; the petitioner did, through his counsel in open court state that he would not interfere with the respondent vaccinating his son, if the law gave them such right, but that he could not consent, or have the act done, or be a party to having it done; that he could only stand

passively by while the law pursued its course and vaccinated the child. The respondent refused to vaccinate without the petitioner's written consent.

The petitioner seeks only to have his son educated in accordance with Section 4836-1, whether the respondent does it in a public school, his home or any other desirable location is not an issue in this case.

The petitioner assumes that for the purpose of this case this court will take judicial notice that federal funds are now being used in part, by the respondent.

BASIS OF JURISDICTION OF THIS COURT.

(a) The jurisdiction of this court is invoked because the petitioner's right of free exercise of his religion, as guaranteed by **Amendment I, of the Constitution of the United States**, to wit:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

has been denied and is being denied to him and his son, by the enforcement of the above vaccination regulation.

(b) The action of the respondent is discriminatory and against the creed and religion of this petitioner and deprives his son of his "Civil rights" in violation of **Amendment XIV of the Constitution of the United States**, to wit:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

(c) Federal funds are now being used in part by the respondent, and greater allocation of funds are planned in the future. To permit the present ruling to stand would deny the petitioner's son of equal participation in such federal grant.

THE QUESTIONS PRESENTED.

1. Has the respondent the right to make compulsory vaccination, a condition precedent, to administering a free education to a child of school years, when such vaccination is contrary to the religious beliefs of the child and its father?

2. The right to a free education is a "Civil right". Can the respondent, in violation of the Fourteenth Amendment of the Constitution of the United States deny the petitioner's son his civil rights under the guise of police power?

3. Has the respondent, under the guise of police power, the right to compel the petitioner to do an act or consent to an act being done (vaccination of his son) that the respondent itself has no power to do; the respondent knowing the act is contrary to the petitioner's religious beliefs and knowing it has no power to do the act?

4. Can the respondent compel the petitioner's child to be vaccinated as a condition precedent to attending public schools, while the child who does not attend the said school is not required to be vaccinated, all contrary to the "equal

protection" clause of the Fourteenth Amendment to the Constitution of the United States?

5. Where does the respondent get the authority to exclude the petitioner's son from enjoying the benefits of federal funds?

REASONS RELIED UPON FOR THE ALLOWANCE OF WRIT.

1. The Supreme Court of Ohio has erred where two federal constitutional questions are involved, and where the United States Supreme Court has not heretofore determined the questions.

2. It is the judgment of the Supreme Court of Ohio that the regulation of the respondent regarding vaccination is constitutional. The necessary effect of the decision is:

(a) To deprive the petitioner and his son of their constitutional rights of free exercise of their religion as guaranteed by Amendment I of the Constitution of the United States.

(b) To deprive the petitioner's son of "equal protection" of the law as guaranteed by Amendment XIV of the Constitution of the United States.

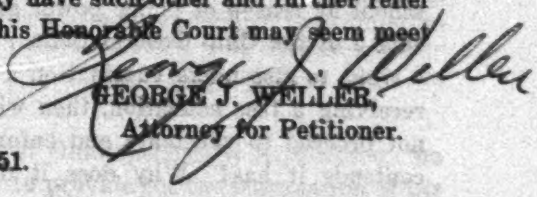
3. The Supreme Court of Ohio has by its two diametrically opposite opinions left the petitioner and his child in a quandary as to their "Civil rights" pertaining to the education of the child. The two said opinions are **State ex rel. v. Dunham, 154 O. S., 63, and The State, ex rel. Dunham, v. Board of Education of City School District, Etc., 154 O. S., 469.**

These cases are commented on in the appended brief.

4. The denial of this petition for certiorari would deny to the petitioner's son the right to participate equally, with other children of his age, in federal funds disbursed by the respondent.

5. The denial of this petition for certiorari would deny this petitioner's son of his inalienable right to a free education.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Supreme Court of Ohio, commanding that court to certify, and to send to this court for review and determination, on a day certain to be named therein, a full and complete transcript of the record and all proceedings in case numbered and entitled on its docket No. 32215, The State, ex rel. Dunham, Appellant, v. Board of Education of City School District of the City of Cincinnati, Appellee, and that said judgment of the said Supreme Court of Ohio may be reversed by this Honorable Court, and your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.



GEORGE J. WELLER,
Attorney for Petitioner.

Dated February 28, 1951.

BRIEF ANNEXED.

FEDERAL CONSTITUTIONAL QUESTIONS INVOLVED.

I. First Amendment to U. S. Constitution.

Petitioner states that if the respondent had vaccinated the petitioner's child, while the petitioner stood **passively by**, this matter would not be here for review; but the respondent did and does demand either (1) the written consent of the petitioner to vaccinate his son, or (2) the petitioner, having the act done himself; both of these conditions are opposed and repugnant to the petitioner's free right to exercise his religious beliefs. Both of these conditions violate the **First Amendment to the Federal Constitution.**

The respondent claims that he has the right to make vaccination a condition precedent to attending a public school by reason of police power granted it under **Section 4838-5 of the Ohio General Code.** If respondent has such a right to also make vaccination a condition precedent to receiving a free education, then why does the respondent not proceed to vaccinate and enforce the police power it contends it has? Why does it demand the consent or active participation of the petitioner? In **State v. Dunham**, 154 O. S., 63—Dictum, page 66:

> "* * * The regulation of the board of education relative to vaccination was adopted pursuant to the authority provided by Section 4838-5, General Code, which reads: 'The board of education of each * * * district may make and enforce such rules and regulations to secure the vaccination and immunization of, and to prevent the spread of communicable diseases

among the pupils attending or eligible to attend the schools of the district, as in its opinion the safety and interest of the public require. **Boards of health, councils of municipal corporations, and trustees of townships, on application of the board of education** of the district, at the public expense, **without delay, shall provide** the means of **vaccination** and immunization **to such pupils as are not provided therewith by their parents** or guardians.' (Emphasis added.)

Our attention has been invited to no law requiring a father to provide for the vaccination of his son. There was no evidence offered by the state tending to prove that the defendant prevented the vaccination of his son, provided for by the portions of Section 4838-5, General Code, emphasized in the above quotation of that statute. * * *"

Dictum, page 67:

"* * * Neither Section 1639-3 nor 1639-45, General Code under which the father was convicted, says anything about vaccination. There is no allegation or proof that the defendant did anything which prevented the vaccination of his son and thereby prevented compliance with a condition precedent to the admission of his son to the public schools. The evidence shows conclusively that the father endeavored to have his son attend the public schools. * * *"

The Supreme Court of Ohio specifically says above, **"no law requiring a father to provide for the vaccination of his son."** On the other hand Section 4849-3, General Code of Ohio:

"Compulsory Attendance; Exceptions; Rules Governing Issuance of Excuses. Every parent, guardian, or other person having charge of any child of compulsory school age who is not employed on an age and schooling certificate and who has not been determined

> in the manner provided by law to be incapable of profiting substantially by further instruction, must send such child to a public, private or parochial school for the full time the school attended is in session which shall in no case be for less than thirty-two weeks per school year * * *"

does demand compulsory education.

Furthermore in **State v. Dunham, 154 O. S., 63,** Justice Turner, in a concurring opinion, to wit:

> "This concurrence is to make plain that we are not opposed to vaccination and do not criticize the board of education for preventing the attendance in schools of any unvaccinated child. The way is pointed out in the majority opinion for the correction of this situation."

indicated that it is the respondent's duty to vaccinate; consent or participation of the petitioner against his religious scruples was unnecessary.

By reason of the foregoing the petitioner says that the Supreme Court of Ohio erred in the case of **The State, ex rel. Dunham v. Board of Education, etc., 154 O. S., 469** in holding that the petitioner and his son's constitutional rights to religious freedom have not been violated.

It is admitted by the respondent that vaccination is contrary to the religious beliefs, precepts and teachings of the petitioner and his church.

The two above cited cases involve the same parties, same dates, same school, same people, same time and are identical in fact.

II. Fourteenth Amendment to the U. S. Constitution.

The **14th Amendment** guarantees all citizens the right to "**equal protection**" of the laws. In this instance the poor and ordinary citizen who seeks the benefit of a "**free education,**" his "**civil right**", is compelled to be vaccinated as a condition precedent to receiving this education. The man of wealth or financial means escapes the vaccination by sending his child to a private school where vaccination is not required.

In both of the above stated cases the children are exposed to other children and persons, one must be vaccinated the other not.

A law pertaining to vaccination to be constitutional must be one effecting **all persons** of the **state equally.** No group, political, has the right to single out another group for special privilege or special duties or special acts or special orders. The law must affect all persons equally. The respondents regulations does not do so.

There is no compulsory vaccination law in the state of Ohio.

A compulsory vaccination law, is proper legislation for the legislative body of the state and all persons would be vaccinated by their own physician or the state would vaccinate them like the Army and Navy does. For a man to have to **consent** to vaccination is an utter **absurdity** and a misapplication of police power, and is not a law of "**equal application**".

This law further **abridges the privileges** of the petitioner to educate his child, and prejudices him because of his religious creed.

This is not a regulation of **universal application,** but on the contrary is decidedly and distinctly **class legislation.**

III. Federal Funds.

Federal funds are now being extended to and used by the respondent in certain instances. The petitioner says, that the respondent has no right, by an arbitrary regulation to prevent the petitioner or his son from participating in the benefits of those funds. Excluding the child from school does specifically that, and deprives this petitioner and his son of their rights without **due process** of law.

OPINION OF SUPREME COURT OF OHIO.

154 O. S. 469, dictum page 470:

"The respondent has authority under the provisions of Section 4838-5, General Code, to adopt a rule excluding from the public schools within its district children who have not been vaccinated. The enforcement of such a rule is not a violation of the constitutional right to religious freedom. State, ex rel. Milhoof, v. Board of Education of Village of Barberton, 76 Ohio St., 297, 81 N. E., 568.

It clearly appears from the record that the board of education has performed its full duty as prescribed by existing statutes.

The judgment of the Court of Appeals is, therefore, affirmed.

Judgment affirmed."

ARGUMENT.

Petitioner here repeats, in part, his printed argument, before the Ohio Supreme Court.

"Counsel for the relator would like to call the court's attention to the Biblical phrase, **'What doth it profiteth a man if he gaineth the whole world and loseth his own soul?'"**

What will it profit the relator, if he gains an education for his son, and loses his own soul by gaining it? What good will it do mankind if it gains an education and loses its soul? What will it profit a man to turn his back on his God Almighty, just to acquire a bit of worldly learning? Must man forfeit his right to worship the Almighty God, because some local group of men say that you must do so in order to acquire, as they say "book larnin'." Certainly the framers of the Constitution of the United States, never contemplated a day when a citizen would have to deny his God in order to be entitled to the knowledge contained in worldly books.

(a) Constitutionality.

To repeat here the Section 7, of Article I, of the Constitution of the state of Ohio, (or Amendment I of the Federal Constitution) would be a vain gesture, but counsel respectfully asks this court,—How can we reconcile an arbitrary act, by a local group, with this positive grant of **Religious Freedom** as ordered and guaranteed by the Constitution? No reconciliation is possible!

(b) Meaning of Statute 4836-1.

There is much discussion in this case of the fact that the appellee is providing other children with a free education at "* * * such places as will be more convenient for the attendance of the largest number thereof." The relator asks, "What is to happen to the rest that are not conveniently located?" There is absolutely no question but that the words above used as to place only have in mind the convenience for the pupils, or a means to prevent the board of education from putting a "place" of education beyond the reach of the majority and in favor of a select minority.

The Section 4836-1 is mentioned in **George D. McGwinn, et al. v. Board of Education, etc.**, 33 O. O., 433. (This case was reviewed and affirmed by this appellate court, but not from the same angle as now used. **See 33 O. O., 428.**) **On page 435, 1st column, the court in the dictum says:**

> "The law of Ohio provides: 'The board of education of each city shall provide * * * for the free education of the youth of school age within the district under its control'. Section 4836-1, General Code."

This is quoted verbatim with the period (.) after the word "control" to show that the statute is to be read just that way; the balance of the wording merely was inserted to assist in convenience for attendance of the "largest" number of eligible persons.

Again in the same case, page 435, column 2:

> "There seems to be no possible question under any definition that the right to a free education granted by state statute constitutes a civil right, (7 Ohio Jur., 464)"

In this same case, on page 436, Ohio Opinions, in column 1, the expression of "free education" is used three times; in the third line, the thirtieth line, and the forty-third line, and is spoken of in these phrases,

"• • • entitled to a free education, • • •"
"• • • the right to free education;"
"• • • same privileges of a free education".

Counsel refers the Court to Vol. 7, Ohio Jur., (1949) sup., pages 16 and 17 "Civil Rights", Section 9—The Fourteenth Amendment, as to no discrimination "race, color or religion • • •". Section 16 and 18 again, no discrimination on account of race, color or creed.

This is legislation that directly violates the Fourteenth Amendment of the United States, besides the religious freedom section; in addition it is a direct violation of Article I, Section 7 of the Ohio Constitution. This man is forced to sacrifice his religion in order to have his child educated.

That portion of Section 4836-1, "• • • at such places as will be most convenient for the attendance of the largest number thereof" refers only to "locale", and has nothing to do with the duty to educate. It refers only to reasonableness of distance or "locale".

Blind, deaf, crippled children are all provided for, even sick children; 1929 A. G. Opns., page 584, an epileptic child had to be educated at home; certainly it is the duty of the defendant to educate children whose religion does not permit use of worldly medical devices, preventatives or so-called cures. It is the defendant's statutory duty to educate until legislature makes the law otherwise.

Conclusions.

There is an unqualified duty upon the board of education, the appellee herein, to educate all the children of the school age in its district. The statute at no place relieves them of that duty. They cannot use the words of the statute, Section 4836-1, referring to locale, and say that if you do not attend our schools, we will not educate you, and then in the same breath made regulations that keep you from the school, and compel you to "sell your soul" and "turn your back on the Almighty God" as a condition precedent to attending a school.

The question of attending or not attending school should not be an issue in this case. The sole issue is this, **"Is the board of education (appellee) providing the child with a free education?"** To that the appellee must say **"No."**, and they try to excuse their failure by misconstruing the law. This legal misconstruction of the statute must be obvious to this court.

The relator says in conclusion, that in this nation a man is not compelled to sacrifice his God in order to obtain an education. The country today needs religion, rather than men who are Godless and endeavor to stamp out religion. The relator renews his prayer and says that the writ of mandamus should issue as prayed for."

CONCLUSION.

Counsel for petitioner summarizes the foregoing pages, and it is his contention that:

(1) All elements giving this court jurisdiction to grant a writ of certiorari are present in this case.

(2) There is involved the question of the constitutionality of a regulation of the respondent as measured by the First and Fourteenth Amendments to the Federal Constitution.

(3) The proper application and benefits of federal funds are to be considered herein.

(4) The equal administration, application and protection of the law is a serious factor and plays a vital part in this case.

The judgment of the Supreme Court of Ohio should be reversed.

Respectfully submitted,

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Attorney for Petitioner.